No. 48026-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Martha Froehlich,

Respondent.

Mason County Superior Court Cause No. 13-1-00445-3

The Honorable Judge Daniel Goodell

Respondent's Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Police violated Ms. Froehlich's Fourth Amendment right to be free from unreasonable searches and seizures by opening her purse as part of an inventory search of her car.

2. Police violated Ms. Froehlich's right to privacy under Wash. Const. art. I, § 7 by opening her purse as part of an inventory search of her car.

> **ISSUE 1:** An appellate court may affirm a trial court decision on any basis supported by the record. Should this court affirm the trial court's suppression order based on the unlawful "inventory" search of Ms. Froehlich's purse?

> **ISSUE 2:** Evidence seized without a warrant is inadmissible unless the prosecution establishes an exception to the warrant requirement. Did police violate Ms. Froehlich's rights under the Fourth Amendment and art. I, § 7 when they opened her purse during an inventory of her car?

3. The Court of Appeals should decline to impose appellate costs, should Appellant substantially prevail and request such costs.

> **ISSUE 3:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Martha Froehlich is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While driving in Mason County, Martha Froehlich collided with a pickup truck. CP 5. Her car came to rest on the shoulder, 100 feet from the intersection where the collision occurred. CP 6. It was off the roadway and did not obstruct travel. CP 6. By contrast, the pickup, which belonged to the Department of Fish and Wildlife, was in the middle of the road, obstructing traffic. RP 28-29.

When Trooper Adam Richardson arrived, he found Ms. Froehlich in the passenger seat of the pickup truck. CP 6. She explained that the accident occurred when the sun got in her eyes. RP 3. She seemed nervous when asked about her registration, but gave Richardson permission to retrieve it from her car. CP 6.

Because she seemed nervous, Richardson asked Ms. Froehlich about drug use. CP 6. She admitted to using marijuana years earlier. RP 26. Richardson did not believe her responses to his questions, and asked her if she used methamphetamine or heroin. RP 26; CP 6.

Richardson was unable to open the door of Froehlich's car. RP 26-27. He reached in through an open window to search for the registration,

but did not find it.[1] RP 10, 27. He noted a marijuana pipe in the center console, and a black purse on the passenger seat. RP 13, 15-16, 21.

Another trooper arrived and began administering field sobriety tests. RP 11. At some point, Ms. Froehlich requested medical care. RP 9. Approximately five minutes later, an ambulance arrived. CP 6-7. Ms. Froehlich was checked by medics, strapped to a gurney, and transported to the hospital. CP 7. The second trooper followed the ambulance to the hospital, completed sobriety testing there, and determined that Ms. Froehlich was not impaired. RP 11.

At no point did Richardson ask Ms. Froehlich what she wanted to do with her car. CP 7. Instead, he summoned a tow truck, planning to impound the car and inventory its contents. CP 12. While waiting for the tow, he retrieved her purse, opened it, and found methamphetamine. CP 7. He later explained that he planned to deliver the purse to her at the hospital, and did not plan to inventory it unless it belonged to someone else. CP 7-8.

Richardson also summoned a tow for the Fish and Wildlife pickup truck. RP 28-29. Instead of impounding the pickup, he allowed the

[1] He did find the vehicle title in the sun visor. CP 6. The car belonged to someone other than Ms. Froehlich. RP 12-13.

department to arrange to have the truck "towed where they wanted it." RP 28-29.

The state charged Ms. Froehlich with possession of methamphetamine with intent to deliver. CP 45. She moved to suppress the items seized from her car. CP 38.

Trooper Richardson was the only witness at the suppression hearing. RP 1-35. He outlined his interactions with Ms. Froehlich and admitted that he never asked her what she wished to have done with her car. RP 28. The state did not present the testimony of the second trooper (who administered field sobriety tests at the scene and at the hospital). RP 1-35.

Following a hearing, the trial court suppressed the evidence. CP 5-9. The court adopted written Findings of Fact and Conclusions of Law in support of its order suppressing the evidence. CP 5. These included the following:

> At no time during the discussion regarding the location and retrieval of the registration, during the discussion related to Ms. Froelich's drug use, or during the subsequent five minutes that Ms. Froelich waited for the ambulance did Trooper Richardson have a discussion with Ms. Froelich regarding what she wanted to do with the car, including her ability to arrange for the removal of the car from the scene. Ms. Froelich appeared to understand all of the discussions that she had with Trooper Richardson.
> CP 7.

> ... Trooper Richardson decided to impound Ms. Froelich's car and had a tow company contacted to do so. This decision was made without asking Ms. Froelich about what she wanted to happen to the car or discussing any alternatives to an impound with her. There was no evidence presented regarding Ms. Froelich's inability to make arrangements to have the car removed from the scene outside of her leaving the scene after several unrelated discussions with Trooper Richardson.
> CP 7.

After the court denied a motion for reconsideration, the prosecution appealed the suppression order. RP 65-90; CP 3.

ARGUMENT

I. THE TRIAL COURT PROPERLY SUPPRESSED EVIDENCE SEIZED FOLLOWING AN UNLAWFUL IMPOUND OF MS. FROEHLICH'S CAR.

A. Standard of Review

A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Unchallenged findings are verities on appeal. *Mueller v. Wells*, 185 Wn.2d 1, 367 P.3d 580 (2016). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The state bears the heavy burden of establishing an exception to the warrant

requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

B. The state failed to justify the impound of Ms. Froelich's car under the community caretaking exception or under RCW 46.55.113, and it failed to prove the absence of reasonable alternatives to impoundment.

Both the Fourth Amendment and art. I, § 7 prohibit searches or seizures undertaken without a search warrant. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). This "blanket prohibition against warrantless searches is subject to a few well-guarded exceptions..." *Id, at* 635.

Here, the prosecution attempted to justify the warrantless search as an inventory search of an impounded vehicle. However, as the trial court found, the impound was unlawful, and could not support an inventory search. CP 4-11.

A vehicle may be lawfully impounded for only three reasons: (1) as evidence of a crime, (2) under the "community caretaking" exception to the warrant requirement, or (3) where the driver commits "a traffic offense for which the legislature has expressly authorized impoundment." *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013). Appellant does not argue that Ms. Froehlich's vehicle was impounded as evidence of a crime. CP 8; *see* Appellant's Opening Brief, pp. 8-24.

Regardless of the justification for impoundment, it is unreasonable to impound if "a reasonable alternative to impoundment exists." *Id.* This is so whether the impoundment is performed as part of community caretaking or under a statute expressly authorizing impound. *Id.*

1. The impound was not a proper exercise of community caretaking because the state failed to prove that no one was available to take care of the vehicle.

Community caretaking does not justify the impound here. A community caretaking impound is permissible only where "the defendant, the defendant's spouse, or friends are not available to move the vehicle." *Id.*

As the trial court determined, the state did not meet its burden of establishing the community caretaking exception. CP 9. The state failed to prove that no one was available to take care of the vehicle. CP 9. Throughout all the conversations Trooper Richardson had with Ms. Froehlich, he never once asked her if she could pay for a tow, if she subscribed to a roadside assistance service (such as the American Automobile Association), or if she had a spouse or friends who could come make arrangements with the tow company.[2] CP 9.

[2] Furthermore, the state did not even present the testimony of the second trooper, who may have discussed alternatives to impoundment either at the scene or at the hospital. CP 7; RP 11. Absent this second trooper's testimony, the state failed to satisfy its heavy burden of proving the exception.

The trial court specifically found that Trooper Richardson did not discuss with Ms. Froehlich "what she wanted to do with the car, including her ability to arrange for the removal of the car from the scene." Finding No. 10, CP 7. Respondent did not assign error to this finding, and it is a verity on appeal. *Mueller**Error! Bookmark not defined.***, 185 Wn.2d 1.

The court also found that Trooper Richardson decided to impound the car "without asking Ms. Froehlich about what she wanted to happen to the car or discussing any alternatives to an impound." Finding No. 12, CP 7. In addition, the court found that "[t]here was no evidence presented regarding Ms. Froelich's [sic] inability to make arrangements to have the car removed from the scene outside of her leaving the scene after several unrelated discussions with Trooper Richardson." Finding No. 12, CP 7.

These findings, too, are verities on appeal.[3] *Id.*

The state failed to prove that no one was available to take care of the car. Accordingly, the state did not meet its heavy burden of showing that community caretaking justified the impound. *Id.*

Respondent makes several errors in arguing that Trooper Richardson satisfied community caretaking.

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[3] Although the state assigned error to Finding No. 12, it disputes only the implication that Ms. Froehlich was the legal owner of the car. Appellant's Opening Brief, p. 2 ("The trial court erred in Finding of Fact Number 12, to the extent that the trial court found that Froehlich was the owner of the red car that she was driving.") *See also* Appellant's Opening Brief, pp. 8-11.

It is irrelevant that Ms. Froehlich was not the legal owner of the car. *See* Appellant's Opening Brief, pp. 2, 8-11, 18. The *Tyler* court refers to the availability of "the defendant, the defendant's spouse, or friends." *Id.* It does not place any limitation on who can help deal with a problem vehicle. *Id.*

Indeed, where the defendant is not the legal owner, police may have to take the additional step of contacting the owner prior to impounding, if such a step is reasonable under the circumstances. *See Tyler*, 177 Wn.2d at 700. There is no indication Trooper Richardson attempted to contact the legal owner of the car in this case.[4] RP 1-35.

Likewise unpersuasive is Respondent's argument that police had no duty to ask Ms. Froehlich if anyone was available to take care of the vehicle. *See* Brief of Appellant, pp. 11-15. The burden is on the state to prove an exception to the warrant requirement, which means the prosecution is obligated to prove that no one was available. *Id.; see Garvin*, 166 Wn.2d at 250. The officers' failure to ask means the state is unable to satisfy its burden. *Garvin*, 166 Wn.2d at 250.

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[4] It may have been reasonable for him to take the time to do so, given that the car was not actually blocking traffic. CP 6. The court did not make a finding on this issue; this must be held against the state. *Armenta*, 134 Wn.2d at 14. Given the absence of a finding on this issue, the Court of Appeals can affirm the trial court's suppression order on the basis of the trooper's failure to attempt contact with the registered owner. *See Bale v. Allison*, 173 Wn. App. 435, 453 n. 9, 294 P.3d 789 (2013) (a reviewing court may sustain a trial court's ruling on any correct ground, even if the trial court did not consider it.)

For example, in *Tyler*, police ascertained that the driver and his passenger both had suspended licenses, that the car's owner was in jail (and also had a suspended license), and that no one could be located by phone to come and drive the vehicle away. *Id.*, at 695. Having taken all these steps, the officer in *Tyler* was justified in impounding under the community caretaking exception. *Id.*, at 699-700.

Respondent attempts to excuse Trooper Richardson's failure to inquire by suggesting that he was exceptionally busy prior to Ms. Froehlich's departure by ambulance. *See* Brief of Appellant, pp. 12, 13. This assertion is belied by the testimony and the court's unchallenged findings. Trooper Richardson had time to ask about drug use, and his colleague had time to start administering field sobriety tests. CP 6; RP 11.

Furthermore, Ms. Froehlich remained on scene waiting for an ambulance after she voiced her concern about being injured. CP 6-7; RP 9-10. During those five minutes, both Trooper Richardson and his colleague should have known that Ms. Froehlich might leave by ambulance, and could have asked her then about her wishes for the car.[5] CP 6-7.

[5] In addition, the second trooper could have relayed Ms. Froehlich's wishes from the hospital, where he completed the field sobriety tests and determined she was not impaired. RP 11. However, as noted, the state did not provide his testimony. RP 1-35.

Nor did Trooper Richardson actually testify that he was too busy to ask about alternatives to impoundment. RP 1-35. He referred specifically to two other troopers who were present, but did not say how many other officers responded, or what they were all doing while Ms. Froehlich remained at the scene. RP 11, 14.

Contrary to Appellant's argument, Trooper Richardson should have "prioritize[ed] a conversation with Froehlich about what to do with the car" over his questions about her drug use. *See* Appellant's Opening Brief, p. 13. His failure to do so resulted in the state's inability to meet its burden at the suppression hearing.

The state did not prove a valid community caretaking impound of Ms. Froehlich's car. *Id.* The trial court's suppression order must be affirmed. *Id.*

2. The state failed to establish statutory authorization for the impound.

The impound was not valid under RCW 46.55.113(2)(b) or (c). Both provisions allow for impound when the officer "finds" an unattended vehicle.[6] As the trial court correctly determined, Trooper Richardson did

[6] RCW 46.55.113(2)(b) refers to unattended vehicles that obstruct traffic or jeopardize public safety; subsection (c) refers to unattended vehicles at the scene of an accident.

not "find" an unattended vehicle: the vehicle was attended when he found it. CP 6, 10.

Nor was Ms. Froehlich "physically or mentally incapable of deciding upon steps to be taken to protect... her property." RCW 46.55.113(2)(c). Trooper Richardson acknowledged that she understood all his questions, and the court found that she was capable of "deciding upon steps" to be taken. CP 7, 10.

RCW 46.55.113 does not support impoundment in this case. The suppression order must be affirmed.

3. The state failed to prove that no reasonable alternative to impoundment existed.[7]

Even if impound is justified by community caretaking or statutory authorization, the state must prove that no reasonable alternatives to impoundment existed. *Tyler*, 177 Wn.2d at 698. The state failed to do so in this case. CP 9.

The car could have been towed to a place of Ms. Froehlich's choosing.[8] Indeed, this is what happened with the other vehicle, which was

[7] The trial court did not reach this part of the analysis. However, the Court of Appeals may sustain a trial court's ruling on any correct ground, even if the trial court did not consider it. *Bale*, 173 Wn. App. at 453 n. 9.

[8] Alternatively, it is possible that the car could have been towed to the nearby gas station (RP 18) or moved further off the roadway. Although the position of the car prevented Richardson from opening the door to secure it (RP 26-27), the state did not prove that a tow

in the middle of the roadway obstructing traffic following the accident. RP 28-29; CP 8.

The state failed to prove that no alternatives existed. Accordingly, the trial court's suppression order must be affirmed. *Tyler*, 177 Wn.2d at 698.

II. THE COURT OF APPEALS MAY AFFIRM ON ALTERNATE GROUNDS, INCLUDING THE PROSECUTION'S FAILURE TO ESTABLISH A PROPER INVENTORY SEARCH.

A reviewing court may affirm a trial court decision on any correct ground. *Bale*, 173 Wn. App. at 453 n. 9. This includes grounds that the trial court did not consider. *Id.*

A. Richardson lacked authority to open Ms. Froehlich's purse pursuant to an inventory search.

Even if Trooper Richardson had the authority to inventory Ms. Froehlich's vehicle, art. I, § 7 prohibited him from opening her purse. *State v. Wisdom*, 187 Wn. App. 652, 673-678, 349 P.3d 953 (2015), *as amended on reconsideration in part* (Sept. 3, 2015). In *Wisdom,* the Court of Appeals suppressed the fruits of an inventory search of a shaving kit bag, which it likened to a purse. *Id., at* 670.

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truck driver would have been unable to close the windows and lock the doors after moving the car a short distance. RP 1-35.

As in *Wisdom,* Richardson should not have opened Ms. Froehlich's purse. Instead, he was authorized to record the unopened purse "as a whole," in his inventory of the car. *Id.*, at 677. *See also State v. White,* 135 Wn.2d 761, 958 P.2d 982 (1998); *State v. Houser,* 95 Wn.2d 143, 622 P.2d 1218 (1980); *State v. Dugas,* 109 Wn. App. 592, 36 P.3d 577 (2001).

The search of Ms. Froehlich's purse was not justified. *Wisdom*, 187 Wn. App. at 673-678. Accordingly, the trial court's suppression order must be affirmed. *Id.*

B. The prosecution failed to prove that the purse search was conducted pursuant to standardized criteria.

To justify a search under the inventory exception, the prosecution must prove that it was conducted pursuant to "standardized criteria... or established routine." *Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990) By requiring compliance with standardized procedures, the doctrine removes the inference that police have engaged in a search for evidence. *United States v. Taylor*, 636 F.3d 461, 464 (8th Cir. 2011), *rehearing denied.*

Here, Trooper Richardson testified that he did a preliminary search of Ms. Froehlich's purse *before* deciding whether or not it would be included in his inventory. CP 7-8. Trooper Richardson's ad-hoc pre-inventory search was not an inventory search pursuant to "standardized

criteria... or established routine." *Wells*, 495 U.S. at 4.[9] Nor was the pre-inventory search "designed to produce an inventory," another requirement under *Wells*. *Id.*

Because Trooper Richardson's pre-inventory search was not performed pursuant to standardized practices and procedures, the trial court's order must be affirmed. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, -- Wn. App. --, 367 P.3d 612 (2016).[10]

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 367 P.3d 612. The concerns identified by the Supreme Court in

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[9] Furthermore, the prosecution failed to present testimony outlining the state patrol's actual policies and procedures for inventory searches. RP 1-35. Nor did the court make any findings describing the state patrol's policies and procedures. CP 4-11. The absence of such a finding must be held against the state. *Armenta*, 134 Wn.2d at 14. The record does not establish that state patrol policies and procedures comply with *Wells*. This provides another basis for affirming the suppression order. *Bale*, 173 Wn. App. at 453 n. 9.

Blazina apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Ms. Froehlich indigent at the beginning and end of the proceedings in superior court. Order Appointing Attorney filed 4/17/15, Order of Indigency filed 10/12/15, Supp. CP. The court did not determine whether or not Ms. Froehlich has the present or future ability to pay legal financial obligations. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

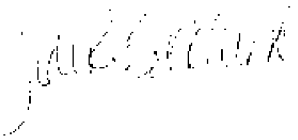
[10] Division II's commissioner has indicated that Division II will follow *Sinclair.*

CONCLUSION

For the foregoing reasons, the trial court's suppression order must be affirmed. If the order is not affirmed, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on April 14, 2016,

BACKLUND AND MISTRY



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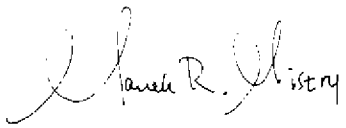

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Respondent's Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
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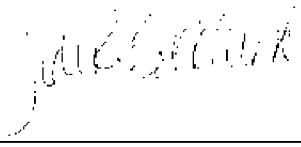
I filed the Respondent's Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 14, 2016.



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